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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALLEN EDWARD HOWELL, Defendant and Appellant.	F077387 (Super. Ct. No. BF156292A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and DeSantos, J.

Defendant Allen Edward Howell contends on appeal the trial court (1) prejudicially erred when it denied his request for a new probation report on resentencing, and (2) abused its discretion when it imposed the upper term. We vacate the sentence and remand for preparation of a new probation report followed by resentencing.

PROCEDURAL SUMMARY

In 2014, defendant was charged with three counts of child molestation involving the same victim. The jury convicted defendant of lewd and lascivious acts against a child under the age of 14 years (Pen. Code, § 288, subd. (a);[1] count 2) and continuous sexual abuse of a child under the age of 14 years (§ 288.5, subd. (a); count 3). The jury was unable to reach a verdict on the charge of oral copulation of a child under the age of 14 years (§ 288a, subd. (c)(1); count 1) and that count was dismissed. The trial court sentenced defendant to the middle term of 12 years on count 3 and, relying on section 667.6, subdivision (c), the full middle term of six years on count 2, for a total determinate prison term of 18 years.

The trial court noted the sole mitigating circumstance was defendant's lack of a known prior criminal record. The court then stated the following when it sentenced defendant:

> "When taking into consideration the weight of the mitigating factor versus the aggravation and taking into consideration case circumstances, it appears the defendant is a mid-term candidate. [¶] While consecutive sentencing is discretionary to the Court, it is felt that this is appropriate, as the victim testified the first incident happened … at the age of 12 and is summed up in Count 2, and the remaining sexual abuse is summed up in Count 3.
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> "It is felt that the defendant should not be given leniency for his repeated offenses. Therefore, it will be ordered a full, separate, and consecutive term be imposed, pursuant to Section 667.6, sub[division] (c).

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1 All statutory references are to the Penal Code unless otherwise noted.

"Therefore, the defendant will be sentenced as follows: As to Count 3, a violation of Penal Code Section 288.5[, subdivision] (a), probation will be denied and the defendant will be sentenced to the Department of Corrections for the mid term of 12 years. [¶] … [¶]

"As to Count 2, a violation of Penal Code Section 288[, subdivision] (a), probation will be denied and the defendant will be sentenced to the Department of Corrections for the mid term of six years. [¶] That sentence to be served fully consecutive to Count 3, for a total fixed term of 18 years."

Defendant appealed, and on November 21, 2017, we concluded defendant was improperly convicted of both count 2 and count 3, pursuant to section 288.5, subdivision (c). We reversed count 2 and remanded to the trial court for resentencing. (*People v. Howell* (Nov. 21, 2017, F073020) [nonpub. opn.].)

On remand, on April 13, 2018, defendant filed a statement in mitigation on resentencing, noting he had not yet received the supplemental probation report.

On April 19, 2018, the supplemental probation report was filed. It did not discuss any new or prior circumstances. The report recommended imposition of the 12-year midterm on count 3.

The same day, defendant filed a sworn declaration describing the progress he had achieved while in prison, as follows:

"Since my sentencing on December 17, 2015, I was committed to the custody of the California Department of Corrections and Rehabilitation. Since I have been a prisoner in state prison, I have never been cited or disciplined for any violation of prison rules and regulations. I have never been referred for misconduct through any [CDC Form] 115 [rule violation] referrals. I can state categorically that I have been a 'model prisoner.'

"Until I was transported to the custody of the sheriff, I was last housed at the facility at Chino, California. After I completed the initial reception phase, I was sent to the Mule Creek facility where I served 13 months between April 2016 and May 2017. At the beginning of my stay at Mule Creek, I was classified as a level 3 prisoner and eventually I was classified as a Level 2 inmate. Later, the Department transferred me to the facility in Chino, California where I have served my sentence until being transported to Kern County for resentencing. At Chino, I worked in the

> prison kitchen since October 23, 2017 and 1 became the 'lead man' for church services every Sunday. I was advanced to serve as a cook in the kitchen five days a week working from noon until 8:00 p.m.
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> "I participate in Bible study every morning after the breakfast meal is served and my group is modeled after the Celebrate Recovery program. My security level has been advanced to level 1." (Italics omitted.)

The same day, the resentencing hearing was held. Defense counsel argued defendant's progress in prison constituted a new circumstance in mitigation. Counsel noted that if defendant had been re-interviewed, he might have admitted further culpability. The prosecutor replied: "I do not care how he has acted in prison for the last three years. That is not an appropriate consideration for his original sentence on the [section] 288.5. [¶] … [¶] It's my position that this defendant only has one mitigating factor, in that he has no prior criminal record prior to the conviction of the [section] 288.5." Defense counsel responded that the difference now was that defendant had "something else in mitigation, given his performance while he was incarcerated during the last few years." The trial court—the same court that originally sentenced defendant—explained that it originally imposed the midterm of 12 years on count 3 because it was able to add three years consecutively on count 2 to achieve the total sentence it believed was warranted. The court said it continued to believe a midterm of 12 years, without more, was not sufficient and thus it intended to impose the upper term on count 3 to achieve a similar sentence. The court then denied probation and sentenced defendant to the upper term of 16 years on count 3 and awarded 1,024 days for time served.

Defense counsel objected to the sentence and stated: "In regard to the probation report which [defendant] has a right to have a new probation report, and we think that right included a new [and] different review, which was not conducted in this particular case." Counsel argued the supplemental report had not considered the current circumstances and defendant had a right to a new probation report upon resentencing.

The prosecutor responded that the supplemental probation report did contain the midterm recommendation defendant wanted, so what more could he ask from a new probation report; the court simply disagreed with the recommendation. Defense counsel answered that defendant should have been interviewed again and the resulting new probation report might have recommended a lower term.

Ultimately, the court adhered to the 16-year sentence.

The same day, defendant filed a notice of appeal.

FACTS[2]

"The victim … is defendant's granddaughter. [The victim] was born in 1996 and, when she was eight years old, defendant and his domestic partner … adopted [the victim] and her brother. In May 2009, defendant and [the domestic partner] split up. A custody battle over [the victim] and her brother subsequently ensued, and … [the victim]'s interests were represented by Dawn Bittleston, a court-appointed attorney. In August 2009, [the victim] moved in with defendant, where she lived with her brother, defendant, his wife and his wife's two children. In February 2014, [the victim] moved in with [the former domestic partner].

"At the end of May 2014, [the victim], [the victim's] mother and [the former domestic partner] were talking one night. [The victim]'s mother … disclosed that when she was younger, she was raped at home by someone she 'considered [her] cousin.' [The victim] became quiet, drew her legs up, and began rocking and sobbing. She repeatedly said, ' "He told me not to tell." ' She then disclosed to [the victim's mother] and [the former domestic partner] that defendant had molested her. [The former domestic partner] called the police.

"At trial, [the victim] testified that after she moved in with defendant in August 2009, he began conducting monthly 'body checks' on her in his locked bedroom.[3]

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2 The facts are taken from *People v. Howell*, *supra*, F073020.

Defendant would direct [the victim] to disrobe entirely and lie on his bed. He then fondled her breasts, and visually inspected her vagina and anus, during which his fingers made contact with her vaginal and anal areas. [The victim] testified the body checks started in 2009 when she was 12 or 13 years old and occurred until her junior year in high school, approximately. She did not tell anyone until 2014, when she disclosed the abuse to [the victim's mother] and [the former domestic partner].

"During a pretextual phone call with [the victim] that was played for the jury, defendant admitted conducting nude body checks, but said he conducted them because she was not cleaning herself properly and she had complained about bumps on her breasts and vaginal discharge. Defendant said he was wrong for conducting the body checks and apologized, but denied he molested her.

"Pursuant to Evidence Code section 1108, the prosecutor also introduced evidence of prior uncharged sexual misconduct. Defendant's [sister] … testified that when she was around 11 years old and defendant was around 14 years old, he 'constantly' asked her to allow him to orally copulate her and when she finally agreed, he did so for months.[4] [The sister] testified that the night [the victim] disclosed her abuse to [the victim's mother] and [the former domestic partner], they then called [the sister], who offered support to [the victim]. Defendant's former cousin-in-law … also testified that she and her family moved in with defendant when she was six or seven years old, and he thereafter masturbated in front of her on one occasion and orally copulated her on another.[5] [She] testified defendant threatened to harm her mother if she told and she did not disclose the abuse to anyone until she was 18 years old.

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3 "[The victim] also testified about an incident of oral copulation that occurred earlier, when she was 12 years old and going into the sixth grade. That allegation was charged as count 1, which was dismissed after the jury was unable to reach a verdict."

4 "These incidents occurred in 1971."

5 "These incidents occurred in 1986."

"Defendant's wife … and his stepdaughter … testified on his behalf. [The wife] testified defendant and [the victim] were very close, and defendant was alone with [the victim] only two or three times between 2009 and 2014. [The stepdaughter], who is a year younger than [the victim], testified that [the victim] never disclosed any abuse to her even though they were very close during a one to two year period and they shared a bedroom. She described defendant as '[v]ery nice, loving, [and] supportive,' and she testified he never behaved inappropriately or made her uncomfortable. [The wife] and [the stepdaughter] both testified nothing seemed out of the ordinary between defendant and [the victim]. Dr. Gary Longwith, a clinical psychologist, testified that based on his evaluation, defendant 'tended to be truthful,' was at very low risk for sexual or violent behavior and there was no indication he had abnormal sexual interests or interests in children.[6]" (*People v. Howell*, *supra*, F073020.)

DISCUSSION

Defendant contends the trial court erred when it denied his request for a new probation report, which would have included information regarding his time in prison and the progress he made there. The People concede the trial court erred, but they maintain the court's failure was harmless because the new information was nevertheless before the court in that defendant "filed a sworn declaration describing his conduct in prison" and defense counsel "emphasized this information when addressing the court." Thus, the People assert, defendant has failed to demonstrate a reasonable probability of a result more favorable but for the error. Defendant replies that in the absence of a corroborating probation report, his declaration could have been viewed by the court as self-serving

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6 "Dr. Longwith based his assessment on information he gathered during his interview with defendant and a number of tests he administered. His assessment did not include review of the facts underlying the criminal charges in this case or the facts underlying the prior uncharged sexual offenses involving [defendant's sister] and [former cousin-in-law]."

hearsay. He notes the prosecutor's argument that defendant's progress in prison was "completely irrelevant" and "not an appropriate consideration" may have affected the court's view of the information in his declaration.

On remand for resentencing, a trial court may consider the defendant's postconviction behavior, both good and bad. (See, e.g., *Dix v. Superior Court* (1991) 53 Cal.3d 442, 460 ["it is well settled that when a case is remanded for resentencing after an appeal, the defendant is entitled to 'all the normal rights and procedures available at his original sentencing' [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed"]; *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744 ["the court may properly consider all matters affecting a defendant being resentenced up to and including the date of resentencing"]; *People v. Bullock* (1994) 26 Cal.App.4th 985, 990 ["There may be compelling reasons for ordering a probation report even when the defendant is ineligible for probation. The defendant's postconviction behavior and other possible developments remain relevant to the trial court's consideration upon resentencing."]; *People v. Foley* (1985) 170 Cal.App.3d 1039, 1047 ["If a defendant's postconviction behavior in prison is relevant to setting his term at his original sentencing, we can see no reason why it would not be relevant to the setting of his term upon resentencing."].)

Here, the parties agree defendant was eligible for probation and a significant amount of time had passed since his original probation report was prepared; thus, the court was required to order a new probation report that considered defendant's conduct in prison. (Cal. Rules of Court, rule 4.411(a); *People v. Dobbins* (2005) 127 Cal.App.4th 176, 180.) We conclude it is reasonably probable the trial court would have given more weight to positive information in a new probation report than in defendant's own declaration and would have considered imposing a different sentence. (*People v. Dobbins, supra,* 127 Cal.App.4th at p. 182 [applying the standard of prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836].) Accordingly, we will vacate the sentence

and remand for resentencing with a new probation report.[7] This resolution renders moot defendant's contention that the trial court's imposition of the upper term was an abuse of discretion.

DISPOSITION

The sentence is vacated, and the matter is remanded for preparation of a new probation report followed by resentencing.

[7] We express no opinion on how the trial court should exercise its sentencing discretion on remand.